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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

IMRAN ALRAI

\* \* \* \* \*

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\* 18-cr-192-01-JL

\* November 22, 2019

\* 2:45 p.m.

\*

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TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government:

John S. Davis, AUSA  
Matthew Hunter, AUSA  
Cam T. Le, AUSA  
U.S. Attorney's Office

For the Defendant:

Timothy M. Harrington, Esq.  
Shaheen & Gordon, PA

Also Present:

John J. Commisso, Esq.  
Commisso Law P.C.

Court Reporter:

Susan M. Bateman, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for  
3 consideration today a telephone conference in criminal case  
4 number 18-cr-192-01-JL, United States of America versus Imran  
5 Alrai.

6 THE COURT: All right. I've reviewed your  
7 submissions.

8 The background -- as far as I can tell, there were  
9 three issues that we discussed and attempted to resolve at the  
10 last conference. And we resolved two of them that appear to  
11 have been already executed by you, but the third one remains  
12 unresolved, right?

13 MR. HUNTER: Correct, your Honor. It remains  
14 unresolved. We did -- just literally fifteen minutes before  
15 the conference we received a production from United Way  
16 containing all the documents in the database --

17 THE COURT: Hold on. Hold on. Hold on. The  
18 reporter can't hear you.

19 MR. HARRINGTON: I'll move closer to the phone.

20 THE COURT: Well, wait a minute. Listen, I don't  
21 want a recitation of things that you already resolved.

22 There were three issues, right?

23 There was the list of RSM personnel spoke with.  
24 There was access to the 2 terabyte hard drive with images of  
25 certain UWMB computers. Those two things are done, right?

1 MR. HUNTER: Yes.

2 THE COURT: All right.

3 The third issue is this -- it was a tough one that  
4 we had some difficulty with.

5 I just wanted to point out though this submission  
6 from the government, whoever wrote it, says that I asked you  
7 to confer about these three issues? I thought we resolved two  
8 and I asked you to confer about the third. It's sort of a  
9 moot point. You have resolved the first two already.

10 The third point is this additional documents  
11 regarding the e-discovery database that UWMB's outside counsel  
12 created as part of the internal, right?

13 MR. HUNTER: Yes, your Honor.

14 THE COURT: Okay. I've read your submissions.

15 I mean, is there anything else anybody wants to say  
16 to me? I'm going to try to figure out a solution to this.

17 Look, I'm not going to bar the testimony of the  
18 expert, but I'm also prepared to provide some discovery relief  
19 to the defense in terms of what the government is able to  
20 present, what opinions it's able to present, and  
21 cross-examination permitted by defense counsel.

22 I feel I need to address this. I don't accept many  
23 of the propositions advanced by the government. I don't think  
24 it's about discovery. I think it's about expert disclosure.

25 My general approach to expert testimony is that

1 what one side has access to both sides have access to when it  
2 comes to experts.

3           You've explained to me the difference between --  
4 your view of it between what was considered by the expert,  
5 actually considered, and what was available. And I realize  
6 that it's not necessarily the case that defense counsel's  
7 expert can have access to every conceivable thing that was  
8 available to a prosecution expert, but I think the idea that  
9 only what an expert considers is relevant for discovery is not  
10 exactly the case. So I'm going to try to find the right  
11 balance here.

12           Let me ask this question. I do think, Mr.  
13 Harrington, your extensive list here for search terms, search  
14 terms and e-mail search, I think they were excessive, okay? I  
15 know you probably want this information and it's not based on  
16 thin air, it's based on your knowledge and your client's  
17 knowledge of the situation here, but that did appear to be a  
18 lot.

19           So let me ask you, Mr. Davis, or whoever is  
20 running -- who's running the tech part of this, Hunter, Davis?  
21 Who's running it?

22           MR. DAVIS: I'm the lead AUSA, Judge.

23           Matt has been the lead on discovery and tech and  
24 Matt Hunter wrote the briefs on this motion, so it's Matt's  
25 argument.

1           THE COURT: Okay. I'll take it up with Mr. Hunter  
2 then.

3           Mr. Hunter, let me ask you this question. Based on  
4 your consultation with United Way's counsel, would it make any  
5 difference if these search terms and e-mail searches were  
6 narrowed significantly or would it still be the same, many  
7 months and many thousands of dollars?

8           MR. HUNTER: Well, your Honor, I think it really  
9 depends on the nature of the negotiation and how much they're  
10 narrowing it, and so it's hard to answer that in the abstract.

11           My understanding is anything approaching this was  
12 going to be a month's long discovery process.

13           THE COURT: Okay.

14           MR. HUNTER: One thing I do want to note, your  
15 Honor, is from our consultations with John Commisso, who is on  
16 the line, we were able to identify every single document in  
17 the database that was viewed or accessed by someone from RSM,  
18 and we've produced this afternoon as soon as we got them every  
19 document that has not previously been produced that was  
20 accessed by RSM even if they never considered it. So it's  
21 anything they actually looked at. We were able to identify  
22 that and get it out to the defendant.

23           THE COURT: Well, I appreciate that, and that  
24 was -- I appreciate that you took the initiative just to get  
25 it done. So thank you for that.

1 Well, let me try this. Let me ask you, Mr.  
2 Harrington. The search terms in the e-mail, are they in any  
3 particular order in terms of, you know -- they don't look  
4 alphabetized. Are they in order of anything like relevance or  
5 probative value to you?

6 MR. HARRINGTON: They are not, Judge.

7 THE COURT: All right. So if we shorten the list,  
8 you would have to work with your client to I guess make some  
9 selections here.

10 MR. HARRINGTON: Yes, Judge.

11 THE COURT: Okay. But what I'm trying to figure  
12 out is if that would even help. I mean, if it's still really  
13 burdensome and impossible, you know, we have a couple of  
14 solutions. It's continue the trial so we can get all this  
15 done and figure out who's going to pay for it. It might be  
16 your client, Mr. Harrington. I'm not sure, but it might be.  
17 So we have to figure out -- or if we can get this to a  
18 manageable level so the prosecution and United Way's counsel  
19 can get this ready for our trial that's going to start a week  
20 from now, or a little over. What is it, two weeks from now?  
21 A week and a half, right?

22 So let me ask you then. Did you work up this list,  
23 Mr. Harrington -- without waiving any privileges, of course,  
24 is this just based on your own study of the file or did you  
25 work this with your client?

1 MR. HARRINGTON: It was actually with my client as  
2 well as the IT expert and a CPA expert, your Honor.

3 THE COURT: All right. And here's another  
4 question. Because I think Mr. Hunter makes one very good  
5 point in his papers here, which is that, you know, the expert  
6 is opining on a couple of narrow issues regarding economic  
7 loss, right? These searches to me -- can you really tell me  
8 that these are all tailored to economic loss, which is the  
9 topic of the expert testimony, or is some of this really just  
10 guilt or innocence or impeachment material not of the expert  
11 himself but of other witnesses? I mean, how tailored is your  
12 list to the expert opinion involved which is only on economic  
13 loss?

14 MR. HARRINGTON: We could tailor it more, Judge. I  
15 did think that all the information we were trying to seek  
16 would be relevant to the expert. You know, for example, part  
17 of what the prosecution has indicated was that they told him  
18 to just assume fraud, and I understand that they told him that  
19 but I still think that would be an area where I could  
20 cross-examine him.

21 THE COURT: Of course.

22 MR. HARRINGTON: So I think some of that  
23 information -- even though the government said to assume it,  
24 if I'm able to obtain information that would go to that issue,  
25 I think I would cross-examine him on it, and that obviously is

1 the main part of what we're trying to get with these searches  
2 is information about the procurement process, the fraud that  
3 they're saying was used in that process, that it wasn't an  
4 open process, my client controlled it all, which I think the  
5 information I'm seeking would show that that's not accurate.  
6 So that was the focus of what I was trying to get at.

7 THE COURT: Okay. I understand that and I  
8 understand why you would be interested in it, but that's not  
9 what the expert is going to talk about, the prosecution  
10 expert. He's not going to talk about -- he's not going to  
11 provide evidence of guilt, at least as far as I understand.

12 I'm looking at the submission here, document No.  
13 51, filed by the prosecution. Let me take a second look at  
14 it.

15 Yeah, there's a good passage here on page 4, right?  
16 I'm looking at page 4, third full paragraph or second full  
17 paragraph under Roman numeral I. For purposes of his report  
18 the government asked Naviloff to "assume that Alrai  
19 fraudulently obtained all contracts between these two  
20 entities. Accordingly, Mr. Naviloff has not and will not  
21 opine about the legitimacy of the contract procurement process  
22 or the legal conclusion of whether the defendant defrauded  
23 United Way. Rather, his analysis is limited to determining  
24 the loss to UWMB resulting from duplicative billing, excessive  
25 billing, and billing for certain services United Way paid for



1 but DigitalNet did not provide, and separately, based on the  
2 defendant's bank and tax records, how much the defendant was  
3 personally enriched. The defendant has every document  
4 Naviloff considered in this accounting."

5 So I'm not sure how I would discern this, Mr.  
6 Harrington. When I read your, like, e-mail list, for example,  
7 I'm assuming you're digging for information as anyone would in  
8 your position, by the way, but you're digging for information  
9 regarding procurement regarding fraud, right? And I think if  
10 you don't do that, you can probably reduce these lists I would  
11 say dramatically. Am I right about that?

12 MR. HARRINGTON: I'm not certain, Judge. Perhaps,  
13 but I'm not certain.

14 I also think that some of the things that -- I know  
15 the government is trying to limit what Naviloff can testify  
16 about, but part of it is if you look at his own report, he  
17 talks about reviewing and imaging, you know, laptops and all  
18 the information that was on those laptops, the VDIs, virtual  
19 desktop images, and so that was part of his review and we  
20 don't have all that information.

21 THE COURT: I know, but if he's not going to opine  
22 about it -- if he's not going to opine about it, I think it  
23 was up to you -- if this is just general discovery of  
24 information, not information to either cross his expert on  
25 economic loss or prepare your expert on the same topic, the

1 fact that their expert had access to something isn't really  
2 the issue. What you're entitled to for that reason is more  
3 closely aligned with what Mr. Hunter has represented here in  
4 his papers.

5 General discovery about the crime here, you know,  
6 criminal liability for these counts, that's just information  
7 that you could have sought on your own and sought relief from  
8 the Court on your own.

9 A motion in limine to limit the expert's opinions  
10 about those issues is not the proper vehicle for that. I  
11 think you understand what I'm saying, right?

12 MR. HARRINGTON: I do, your Honor, but I think some  
13 of this information is kind of hand in glove because trying to  
14 demonstrate or cross-examine about economic loss or have my  
15 expert prepare about economic loss, it also would entail going  
16 through e-mails that circulate, you know, between the IT  
17 teams. For example, this idea that services were billed for  
18 that weren't provided.

19 THE COURT: But that is -- I understand, Mr.  
20 Harrington, but that's general discovery. That's not -- the  
21 prosecution expert assumed that. And you can cross-examine on  
22 that topic and that's I think fertile for you, right? He was  
23 asked to assume the crime happened, and you're probably going  
24 to make some hay with that, right? At least you plan to,  
25 right?

1 But what he had access to in terms of evidence of  
2 procurement, misrepresentations, and fraud, that's not really  
3 what he's going to opine about anyway. So your lack of access  
4 to that information -- it might be something you're entitled  
5 to in normal discovery, like a subpoena, a subpoena duces  
6 tecum to the trial or just some proceeding in advance of trial  
7 in order to help you prepare, but it's not a reason to limit  
8 the prosecution's expert. I'm not prepared to grant that  
9 relief.

10 I keep asking you about this and you keep going  
11 back to fraud and procurement, but that's not the opinions  
12 that this expert is going to provide.

13 MR. HARRINGTON: I wouldn't necessarily say it's  
14 all about procurement. What I was going to say, Judge, is  
15 that, for example, one of the areas that the expert would  
16 testify about, as I understand it anyway, the allegation is my  
17 client billed for services that weren't rendered is one area.

18 However, I believe that the discovery that I'm  
19 seeking -- so if that goes to economic loss, billing for  
20 services that weren't rendered and he's going to testify about  
21 that, the discovery that I'm seeking, whether it's relative to  
22 e-mails, it would be about communications between IT people  
23 about the provision of those specific services. So it does go  
24 directly to the issue of the provision of services and the  
25 economic loss.

1           THE COURT: Well, no, that's two different things.  
2   Provision of services and -- look, here's the thing, though.  
3   You're not seeking discovery, Mr. Harrington. You're seeking  
4   to exclude the testimony of an expert. If you were seeking  
5   discovery, this would be a different conversation and I assume  
6   it would be happening much sooner than a week and a half  
7   before trial.

8           You didn't file any discovery motion. You filed a  
9   motion to limit their expert's testimony, right? And as a way  
10   of trying to make testimony more fair, I thought, well, I'll  
11   try to provide you some access to more fodder for  
12   cross-examination and ability to prepare your expert to rebut,  
13   but you didn't file a discovery motion.

14           What I need to know -- look, if you haven't done  
15   the work to obtain the discovery you need to defend this  
16   gentleman at trial, we need to figure out if we can get it to  
17   you within trial here at a reasonable expense and -- I mean,  
18   it's been represented to me this can't be done before the  
19   current trial date. So if you need to have a delay, that's  
20   what you need to ask for, but asking me to limit the  
21   prosecution's expert based on discovery misconduct, I don't  
22   think I can find that. I don't think I can find discovery  
23   misconduct here on the part of the prosecution.

24           Do you think I can?

25           MR. HARRINGTON: I wouldn't characterize the

1 government's conduct as misconduct, Judge.

2 THE COURT: Okay.

3 MR. HARRINGTON: But what I would say is this. I  
4 think their expert had access to information which is relevant  
5 to his report and his opinion that he's going to render before  
6 you that I haven't had access to.

7 So I'm not saying that the government has something  
8 in its file that it hasn't given me. So I don't want you to  
9 think that I'm saying they've withheld something.

10 THE COURT: No.

11 MR. HARRINGTON: I think the United Way has this  
12 database that government's expert had access to and used in  
13 coming to his expert opinion, and I don't believe that we've  
14 had equal access to that.

15 THE COURT: Well, wait a minute. I think we agree  
16 though that what he used, what he relied on, what he actually  
17 saw, and a subset of that is what he relied on, that has been  
18 provided to you now, right, or is about to be.

19 Right, Mr. Hunter?

20 MR. HUNTER: That's correct, your Honor. We just  
21 produced it.

22 I will raise one thing just for full candor. My  
23 understanding is there are 19 documents that Mr. Commisso is  
24 providing a privilege log that are privileged, and I don't  
25 know if that impacts anything but I just wanted to disclose

1 that. Other than that, we've produced everything.

2 THE COURT: Okay. Whether it impacted the  
3 privilege log, it depends what Mr. Harrington thinks about it.  
4 I doubt that it's going to have any real problem because I  
5 doubt we can break the privilege here.

6 Well, wait a minute. Was this privileged material  
7 accessed by your expert?

8 MR. HUNTER: I don't know if Mr. Naviloff actually  
9 accessed it. My understanding -- and again, Mr. Commisso is  
10 on the line if he wants to speak to it. He just did this  
11 review quickly over the last couple days. He identified a  
12 body of documents that people from RSM accessed, and of those  
13 19 were privileged or privilege has been identified.

14 THE COURT: All right. Let's not have a privilege  
15 firefight right now. If Mr. Harrington identifies things that  
16 he thinks that they're either not privileged or that you've  
17 waived the privilege, we can have that discussion later.  
18 Let's not complicate this now.

19 But presumably if anybody is not, you know, United  
20 Way or their counsel or a contractor before going to work for  
21 the U.S. government, all right, saw these documents, there  
22 might have been a waiver there.

23 Now, getting back to this. What's been produced  
24 now is everything that Naviloff, the expert, saw and relied  
25 on. What he relied on is a subset of what he saw. He didn't

1     rely on everything he saw.

2                 What hasn't been produced is everything that he had  
3     access to because he obviously declined to see certain things,  
4     probably by using search terms, and the search terms wound up  
5     excluding certain files, certain data, right, certain images,  
6     I assume, and that's a choice.

7                 Now, you can cross-examine him on that choice, Mr.  
8     Harrington. You understand that, right?

9                 MR. HARRINGTON: I do, Judge.

10                THE COURT: All right. And providing you with  
11     access to everything -- I've been informed now that they're  
12     providing you with access to everything that he had access to,  
13     but declined to see or rely on would be very expensive and  
14     very time-consuming. So it obviously can't happen. If I  
15     could have ordered this months ago, I would have, but I can't  
16     now. It won't happen before the trial.

17                Unless you have some reason to dispute their  
18     representation about time and money.

19                MR. HARRINGTON: I don't have -- I just learned  
20     about it as you did, Judge, so I don't have any other  
21     information other than the kind of generalizations that the  
22     government has made.

23                The only other thing I would give you just as far  
24     as information on this is -- the discussions about the access  
25     to the information that Mr. Naviloff had, I started my

1 requests with the government, it's in the pleadings and you  
2 can see that, back in July I've been requesting information,  
3 and the government had not indicated any real resistance to  
4 that until we got to I think October 18th, I think it was,  
5 when they provided me with Naviloff's report. And it was on  
6 that date that I realized that there was this database that we  
7 had not had access to, and that was, as I said, on or about  
8 October 18th. And it was not long after that that the  
9 government had taken the position that they had provided  
10 everything.

11 So that was the time frame, Judge. As far as,  
12 like, filing a motion or something along those lines, it  
13 seemed that the most appropriate path would have been at that  
14 point to file the motion I did. But I understand what you're  
15 saying as far as, you know, filing a motion to compel back in  
16 July.

17 THE COURT: Yeah. Exactly. That was the most  
18 appropriate method, but let me just make sure I understand  
19 something.

20 Are you telling me that you made a document request  
21 for everything Naviloff had access to and that it was  
22 represented to you that you would get that or are you not  
23 saying that?

24 MR. HARRINGTON: It's a little bit of both I would  
25 say, Judge. I made the representation or the request, and the



1 government basically indicated they were looking into it.

2 THE COURT: All right.

3 MR. HARRINGTON: They didn't deny it. They didn't  
4 say, you know, we don't have it. It was kind of an ongoing  
5 process. And the government, you know, through the last  
6 couple of months, and especially in the last week or two, has  
7 continued to provide discovery on a rolling basis.

8 THE COURT: Right. You're saying they didn't  
9 decline or deny, but they also didn't represent to you that  
10 you would see everything that Naviloff had access to?

11 MR. HARRINGTON: I would say that's a fair  
12 characterization, Judge.

13 THE COURT: And you're not suggesting anybody here  
14 on the prosecution side operated in bad faith?

15 MR. HARRINGTON: No, I don't believe that any of  
16 the prosecutors misrepresented anything to me, Judge. I  
17 assumed that they were in the process of seeing whether this  
18 information existed.

19 The only thing that I could say that I was not made  
20 aware of, if you will, would be when I did get Naviloff's  
21 report, there was this footnote -- which you actually have the  
22 report, Judge. It was submitted as an exhibit by the  
23 government.

24 THE COURT: Yes.

25 MR. HARRINGTON: And there's a footnote, and in

1 that footnote is where they reference Naviloff's use -- it's  
2 Mr. Naviloff's reference, obviously -- his use of this  
3 e-discovery platform to run ad hoc searches. That's when I  
4 became aware of that information.

5 Had I been aware of that information, you know,  
6 back in July, I would have had a more specific, you know,  
7 conversation with the government about it, but I wasn't made  
8 aware of that until about I think it was October 18th or 19th.

9 THE COURT: All right. I'm going to take this in  
10 steps then and try to resolve this.

11 Well, I've been talking to you a long time.

12 Mr. Hunter, is there anything else you want me to  
13 know before I try to resolve this and make a few proposals  
14 here?

15 MR. HUNTER: Yes, your Honor.

16 I'll just note, just regarding the defendant's  
17 summary of the discovery requests, the defendant did make  
18 discovery requests and one of them was for all the images made  
19 of the computers of everything that Mr. Naviloff had access  
20 to. We never promised everything and have always taken the  
21 position that every computer or image from a computer would be  
22 unreasonable and that we would confer with United Way and with  
23 Mr. Naviloff and made rolling productions where the defendant  
24 identified things or there was anything that we thought might  
25 be missing.

1           My recollection is a little bit different. I  
2   thought in our discussions -- of course I don't think any of  
3   this is written down, but in our discussions about forensic  
4   images of computers that I mentioned that there was an  
5   e-discovery database that Mr. Naviloff had access to that the  
6   United Way used to provide documents to the government, but  
7   that's the only difference and that would have been as a part  
8   of negotiations about a whole bunch of different topics.

9           THE COURT: All right. I'm going to try to cut  
10   through it here and get to the real information.

11           Mr. Commisso, how do I pronounce your name  
12   correctly?

13           (No response)

14           Sorry about that. I was on mute. I was trying to  
15   speak there for a second.

16           I'm going to try to cut through this and solve this  
17   the best I can.

18           Mr. -- is it Commisso?

19           MR. COMMISSO: It's Commisso, your Honor.

20           THE COURT: Commisso. Thank you. I appreciate you  
21   being involved in this conversation today.

22           Let me ask this. Well, first of all, Mr.  
23   Harrington, what I have on the record here is a motion in  
24   limine to limit the expert conversation. I don't have a  
25   discovery motion.

1           Are you asking at this point for any kind of motion  
2     to continue the trial to allow you to get access to this  
3     information?

4           MR. HARRINGTON: I may do that, Judge. I would  
5     need to consult with my clients first about a continuance, but  
6     that may be an option that I pursue.

7           THE COURT: All right. Then let me see what I can  
8     figure out here with Mr. Commisso.

9           I haven't asked defense counsel this yet, Mr.  
10    Commisso, so I have no idea if it will work, but I'm looking  
11    at these two lists here, search terms and e-mail search. Each  
12    item has 27 items on it, and your point is that to conduct  
13    this e-discovery, for lack of a better word, in a criminal  
14    context would take -- would cost possibly up to \$94,000 and  
15    take -- how much time do you think it would take?

16          MR. COMMISSO: It would take at least several  
17    months and perhaps the same as the six months that we spent in  
18    2018, your Honor.

19          THE COURT: All right. Understood.

20          If I reduce these lists by two-thirds, so nine  
21    items on each list, could you do that between now and the end  
22    of next week?

23          MR. COMMISSO: Your Honor, the short answer is no,  
24    and the reason is, first, the list of search terms isn't 27  
25    terms. If you look at it, each number contains multiple

1 terms. And if you add them all up, it's 102.

2 THE COURT: Oh. I see. Okay.

3 MR. COMMISSO: And then the e-mail list includes  
4 numerous e-mail users whose data is not currently in the  
5 database as it exists. So they're not just asking that we run  
6 new search terms. They're actually asking that we increase  
7 the size of the database that would be used for those  
8 searches.

9 And there's an additional issue, which is just to  
10 get started -- even if you were to say, your Honor, that you  
11 wanted me to run five search terms, or pick any number, before  
12 I could do that we have to get the database fully online,  
13 restored, and ready to be searched, and that next step in the  
14 process would cost about \$5,000.

15 And so I guess that's a long way of answering your  
16 question, which is, no, there's no way to run even a short --  
17 a small search by the end of next week, and just to get that  
18 process started we're going to have to spend \$5,000 to begin  
19 to prepare the database for that search.

20 THE COURT: Right. By the way, my -- for what it's  
21 worth, my approach would not be that your client pay for that.  
22 It would be that the defendant pay for that.

23 MR. HARRINGTON: Judge, just to interject briefly.  
24 This is Tim Harrington.

25 I heard Mr. Commisso talk about increasing the

1 database. I certainly am not looking to increase the  
2 database. Whatever database existed for Mr. Naviloff, that's  
3 all I'm looking for.

4 THE COURT: Yeah, but that's been taken offline as  
5 far as I can tell.

6 MR. HARRINGTON: And if that's the case and I just  
7 simply misunderstood Mr. Commisso, I apologize. I just wanted  
8 to make sure the Court and Mr. Commisso and the government  
9 knew I'm not looking for them to add to the database.  
10 Obviously there may be a technical reason that, you know,  
11 that's not available as it was to Mr. Naviloff.

12 THE COURT: All right.

13 MR. COMMISSO: I guess I'm just -- I'm looking at  
14 page 2 where it says e-mail search and it's a list of e-mail  
15 users, and my understanding of the instructions on page 1 and  
16 what you wanted us to do was basically to collect e-mail from  
17 these various users, and that data may not be currently in the  
18 database. It's a technical issue. I mean, the database is  
19 what it is, but I don't know if these instructions would  
20 actually require us to go and create a bigger database than  
21 Mr. Naviloff had access to.

22 THE COURT: All right.

23 MR. HARRINGTON: And to answer that, obviously it  
24 may have been good to have an IT expert speak to an IT expert,  
25 but my understanding is that the search terms simply would

1 have been searched through those particular e-mail boxes. So  
2 that's my understanding.

3 THE COURT: Well, can you add anything to that, Mr.  
4 Commisso? Mr. Commisso, can you illuminate that at all?

5 MR. COMMISSO: Well, I guess -- I think the last  
6 thing that Mr. Harrington said was to run the search terms  
7 through those e-mail boxes, and that's just not the way that  
8 e-discovery works. The e-mail environment is Google Gmail,  
9 and it doesn't really provide for e-discovery searching.

10 And so in order to run search terms against an  
11 e-mail box, what you have to do is you have to have the  
12 vendor, which is Kroll here, extract that data out of the  
13 Gmail Google environment and then import it into the Kroll  
14 e-discovery tool before you can run the search term.

15 There just isn't a tool within the Gmail  
16 environment that allows us to just run search terms across  
17 either one individual's e-mail account in any way that would  
18 be efficient, which goes back to your first question, your  
19 Honor, which is, you know, can we accomplish something by the  
20 end of next week.

21 THE COURT: Yeah, I understand.

22 MR. COMMISSO: I can tell you in my experience in  
23 doing this for 19 years, well, e-discovery for less than that  
24 because there wasn't e-discovery 19 years ago, but nothing  
25 happens quickly in the world of e-discovery and just basic

1 tasks take many days and usually weeks at the very least.

2 THE COURT: All right. Okay. Look, here's the  
3 ruling then.

4 Mr. Commisso, I don't want to waste your time. If  
5 you want to hang up, you're free to hang up because you're off  
6 the hook here, okay?

7 The only way I can rule is this, as far as I can  
8 tell:

9 The motion -- I'm talking about document 47, the  
10 document to exclude expert testimony. This isn't a discovery  
11 motion. It's a motion to exclude expert testimony.

12 I'm not prepared to prohibit the prosecution's  
13 expert from testifying based on this record.

14 Much of what's been requested by the defense now to  
15 prepare to cross him and prepare his own expert has been  
16 provided. A list of names was provided.

17 And the second item on the list, which was the  
18 defense access to the 2 terabyte hard drive with images of  
19 certain United Way computers, that's been provided.

20 Plus, in addition, Mr. Hunter has explained that  
21 everything that Mr. Naviloff has seen and relied on has now  
22 been provided.

23 I don't think that puts the defendant in a position  
24 of prejudice. However -- so I'm going to deny the motion.  
25 However, this is without prejudice to one thing.



1           Mr. Harrington, if you can make a motion at trial  
2 or before trial -- it would normally be jury instructions, but  
3 it won't be because there's no jury in this bench trial. But  
4 if there are inferences that you want me to draw, all right,  
5 inferences that limit the opinions or go to the credibility of  
6 the expert that you want me to consider based on at least what  
7 you perceive and what you want to persuade me was a denial of  
8 access to some of the material that Naviloff saw, you can  
9 propose that.

10           If I think it's supportable that I should draw  
11 certain negative inferences, the same way we would instruct a  
12 jury, based on some type of inequity between the information  
13 access to the two experts, I will consider that.

14           I would also consider disregarding certain opinion  
15 if you can make a case for it. I'll consider that as well.  
16 And of course I'll give the prosecution an opportunity to  
17 respond to that.

18           But my point is, my ruling denying your motion,  
19 which again is a motion to limit expert testimony, or exclude  
20 it, it's not a discovery motion, that is without prejudice to  
21 your opportunity to request the Court to draw certain negative  
22 inferences about the proof offered and the expert opinions  
23 offered.

24           And if you want to do that, you should do it in  
25 advance of trial so the prosecution has an opportunity to

1     respond to it. It doesn't necessarily have to be responded to  
2     before the start of trial, but at some point that will allow  
3     them to respond and for the Court to consider it.

4             Do you understand the ruling?

5             MR. HARRINGTON: I do, Judge.

6             THE COURT: Does the prosecution understand the  
7     ruling?

8             MR. HUNTER: Yes, your Honor.

9             THE COURT: All right.

10            Hold on one moment for me, please.

11            (OFF THE RECORD)

12            THE COURT: Yeah, my law clerk just reminded me  
13     that I maybe inadvisably brought up the idea of continuing the  
14     trial. That's not what I am encouraging here, by the way.  
15     That's up to Mr. Harrington.

16            Let me say this, Mr. Harrington. Whatever relief  
17     you would want here, be it inferences about the expert  
18     testimony or a trial continuance, which I hope you don't  
19     request because we planned for it, but I also will consider it  
20     if you ask, I think it needs to be focused on the expert  
21     opinion if that's what you're focused on. If you're focused  
22     on Naviloff's opinion, it's got to be you need access to  
23     information that could inform that opinion.

24            General discovery regarding procurement or any  
25     other type of fraud of which the defendant is accused, that's

1 a good old discovery request and that needs to be framed that  
2 way with a showing of need and relevance.

3 So please consider that if you request anymore  
4 relief so I can consider it in its proper context. Because as  
5 far as I'm concerned, if it goes to the expert, it doesn't go  
6 to those issues. It doesn't go to fraud. It doesn't go to  
7 procurement or any other form of misconduct by the defendant.  
8 It goes to economic loss which is the point of Naviloff's  
9 testimony. Understood?

10 MR. HARRINGTON: I think so, Judge.

11 THE COURT: Okay. Is there anything --

12 MR. DAVIS: Judge, can I add one point, please?

13 THE COURT: Sure.

14 MR. DAVIS: Judge, I'm going to file a notice that  
15 corrects and clarifies the government's position on the  
16 Court's questions about what the effect would be of a proof at  
17 trial that failed to prove the Robert Allen scheme or that  
18 proved a separate scheme. I don't think I advised you  
19 correctly.

20 THE COURT: All right.

21 MR. DAVIS: And the law is clear I think under  
22 United States versus Miller, which is a Supreme Court case  
23 from 1985. It is 471 U.S. 130. The law is clear that when  
24 proof at trial narrows the scope of an alleged scheme, there's  
25 not a constructive amendment of a charge and the question is

1     only whether there's been a prejudicial variance.

2             And there are many, many cases that state that  
3     where the government has a conspiracy or a fraud scheme that  
4     alleges more than it ends up proving, a conviction can still  
5     be upheld and a conviction is still proper notwithstanding the  
6     variance.

7             So I'm not going to file a law review article,  
8     believe me, and I notified Mr. Harrington of this a few days  
9     ago on the phone that I did want to file this because I want  
10    you to be properly advised on the law from our perspective.

11            I also think that Mr. Harrington -- because he  
12    withdrew the motion about Robert Allen Group and trying to  
13    exclude that evidence, if he withdrew that motion based on my  
14    representations, we, of course, would not object if he renews  
15    the motion and the Court rules.

16            So I will file that notice no later than this  
17    weekend. I'm actually working on it now and it won't be long,  
18    but I just want to notify the Court that's coming.

19            THE COURT: So if I understand you correctly, what  
20    you're going to -- your understanding of the law would be in  
21    the context of this case if those substantive counts wind up  
22    proving a scheme to defraud that only involves United Way and  
23    doesn't wind up proving also a scheme that involves United Way  
24    and Robert Allen Group, your point is you could still have a  
25    conviction?

1 MR. DAVIS: That's correct.

2 THE COURT: That's what I thought. All right.

3 Hold on a minute.

4 (OFF THE RECORD)

5 Understood. Okay. That's where I thought you were  
6 going. I see.

7 Look, obviously if Mr. Harrington disagrees with  
8 you, he'll either renew his motion or have some other type of  
9 response.

10 And of course I'll give you what time you need, Mr.  
11 Harrington, to respond.

12 MR. HARRINGTON: Thank you, Judge.

13 MR. DAVIS: Thank you, Judge.

14 THE COURT: All right then. Okay.

15 Counsel, I look forward to seeing you a week from  
16 Monday.

17 MR. HUNTER: Thank you, your Honor.

18 MR. DAVIS: Thank you, Judge.

19 MR. HARRINGTON: Have a nice day.

20 (Conclusion of hearing at 3:30 p.m.)

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## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 12-21-20    /s/ Susan M. Bateman  
SUSAN M. BATEMAN, RPR, CRR